Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

U.A. LOCAL 38 CONVALESCENT TRUST FUND, ESTATE OF JOSEPH P. MAZZOLA, and ARISTOCRAT HOTELS, INC.,
Petitioners,

VS.

CAROLE BRADEN, JUANITA RAYMOS, CHRISTINE CHRAPOWICZ and WANDA BROOKS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In a non-diversity case removed from California Superior Court, did the U.S. District Court abuse its discretion in failing to remand the case to state court after all federal claims and causes of action had been voluntarily dismissed, at which point, over a year before trial, the District Court's participation in the case had been insubstantial, but after which point the Court formed a class, ruled on dispositive motions and tried the case with a jury?

2. Did the U.S. District Court properly grant summary judgment of discriminatory and retaliatory non-rehiring under California Government Code 12940(f) to one who did not apply for rehiring? Was the District Court free at trial to retreat from his summary judgment ruling in this connection?

3. Did the U.S. District Court properly direct a verdict of gender discrimination under California Government Code 12940 where the record contained substantial evidence that the allegedly favored employees were better qualified than plaintiffs for the work in question?

4. Where the amount of lost wages damages found by the jury was several times greater than what the evidence would support, and there was reliable evidence that the verdict of lost wages and tips was made on the jury's assumption that all waitpersons underreport their tips, as to which assumption there was no evidence in the record, should the U.S. District Court have granted a new trial on the issue of lost wages damages?

5. In fixing attorney fees and costs of $619,700 in respect of the services of two young lawyers (2000 hours at $170 equals a lodestar of $340,000, enhanced by a multiplier of 1.75 for an additional $255,000, plus $16,200 for work on the fee application and $8,500 in costs, totalling $619,700), did the U.S. District Court abuse its discretion in:

   a. Denying petitioners' request for discovery of the fee agreement between plaintiffs and their counsel?

   b. Denying petitioners' request for discovery of plaintiffs' attorneys' original time records, and instead relying completely for the finding of hours-worked on recently pre-

pared hearsay summaries, in a case in which plaintiffs lost the verdict and judgment on substantial portions of their claims, including the class action and age discrimination?

6. Does the "no-enhancement" rule of *City of Burlington v. Dague* ____ U.S. ____, 112 S. Ct. 2638 (June 24, 1992) apply only where the right to fees is granted by a federal statute, or does it also apply in federal court when the right to fees is granted by a state statute?

List of Parties

Plaintiffs and Respondents	Defendants and Petitioners
Carole Braden	U.A. Local 38 Convalescent Trust Fund
Juanita Raymos	Estate of Joseph P. Mazzola
Christine Chrapowicz	Aristocrat Hotels, Inc.
Wanda Brooks	

Aristocrat Hotels, Inc. has no affiliates, parents or subsidiaries. It is a closely held Colorado corporation engaged in hotel management, with its principal place of business in San Francisco.

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B. *Discovery of Plaintiffs Counsel's Original Time Records.* For the guidance of parties in applications under fee shifting statutes, this Court should hold that original contemporaneous records of hours worked must at least be available for the opposing parties' inspection before the Court can consider recently prepared summaries of those records, expecially where the fee applicant has been unsuccessful in large parts of his case. 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners above-named respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 24, 1992.

OPINION BELOW

The opinion contains a notation that disposition is not appropriate for publication. The opinion is reprinted in the appendix hereto, p. 1a, *infra*. The Order on Petition for Rehearing is included in the Appendix at p. 1b.

JURISDICTION

All four plaintiffs — Braden, Raymos, Chrapowicz, and Brooks — were waitresses at the Konocti Harbor Inn, a Lake County, California hotel and resort owned by petitioner UA Local 38

Plumbers and Pipefitters Convalescent Trust Fund. The four plaintiffs were all members of the Hotel, Motel and Restaurant Employees and Bartenders Union, Local 18. At all times pertinent hereto there was a collective bargaining agreement in effect between Local 18 and Konocti Harbor Inn.

In 1986 plaintiffs were denied continued employment in the Konocti Harbor Inn dining room. In 1987 three of the plaintiffs were not rehired at Konocti, and a fourth did not apply. Having pursued the administrative steps required by the California Fair Employment and Housing Act, California Gov't Code 12940 et seq., the plaintiffs filed the present case on November 17, 1987 in Lake County, California Superior Court. The complaint alleged violations of California's anti-employment discrimination statute but also alleged several causes of action — wrongful discharge in breach of plaintiffs' contractual rights, breach of implied covenant of good faith and fair dealing, discharge in violation of public policy, negligent infliction of emotional distress — which required interpretation of the collective bargaining agreement between Local 18 and Konocti Harbor Inn. These petitioners therefore removed this case to the Federal District Court in San Francisco under 28 U.S.C. 1441(a), on the ground that the above-referenced causes of action implicating the collective bargaining agreement were within the original jurisdiction of the federal district courts under 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). After jury trial in federal court, the U.S. District Court entered judgments totalling $311,949, apportioned among the four waitresses. After a hearing on attorney fees, the Court awarded plaintiffs $619,700 in fees and costs, costs representing only $8,500 of that total. Petitioners appealed to the Ninth Circuit, which affirmed on June 24, 1992. A petition for rehearing was denied on August 21, 1992.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

California Fair Employment and Housing Act, Government Code Section 12940

Sec. 12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practices; exceptions

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

> (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to the employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or terms, conditions or privileges of employment.
>
> * * *
>
> (f) For an employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

California Government Code Section 12965(b)

* * *

In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs.

STATEMENT OF THE CASE

For years the four plaintiffs had worked as waitresses at Konocti Harbor Inn. Konocti usually closed in the winters. In the spring the plaintiffs would work in the coffee shop. When business picked up, the dining room would open and they worked in there. In the fall the dining room closed and the plaintiffs would return to the coffee shop until the resort closed.

The dining room served standard American fare. Food was prepared in the kitchen and there put on the customer's plate. There was no tableside preparation of food.

The dining room always lost money. In 1986 Konocti management decided to remodel the dining room and to change the menu and wine list completely. The new menu, in Italian with translations, contained some 40 items of Northern Italian cuisine and was the same as that which had had some success in a Palm Springs, California restaurant called the Marquis. Konocti hired the head chef from the Marquis, one Pirro, and Pirro brought with him to Konocti a maitre'd and waiter who had worked at the Marquis. They then proceeded to hire Italian waiters from San Francisco and Los Angeles to round out the staff. All of them were males.

In May of 1986 Konocti management told the four plaintiffs there was not enough time to train them in the new menu, which required tableside preparation of almost all items, including preparation of sauces. Konocti management told plaintiffs they could work in the coffee shop in the 1986 season. Three of them did that, and the other, Braden, left Konocti to work elsewhere.

In June of 1986 three of the plaintiffs — all but Braden — filed complaints with the California Department of Fair Employment and Housing. Konocti and Mazzola, who until his death in August of 1989 had been the head of Local 38 for 30 years, were named as respondents. In 1987, when these three women reapplied for work at Konocti, they were turned down. Braden did not file a DFEH complaint in 1986 and did not apply for work at Konocti in 1987.

Turned down at Konocti in the spring of 1987, the three women found work elsewhere. In August of 1987, Henri Lewin, whose company, Petitioner Aristocrat Hotels, Inc. had a management contract at Konocti in 1987 and 1988, offered all four women their jobs in the dining room back, the Italian cuisine policy having been abandoned after 1986. Raymos and Chrapowicz chose not to come back to Konocti. Braden and Brooks returned to work there in 1988 and 1989 before quitting.

In 1986 working in the coffee shop at Konocti, Raymos, Chrapowicz and Brooks made as much or more money in wages and tips than did most of the waiters working in the dining room in 1986. In 1986 working in the coffee shop Raymos made more money than she had made in 1985 working in the dining room. The 1987 wages and tips of plaintiffs from employment in other restaurants were only slightly less than wages and tips of waitpersons working in the Konocti dining room in that year. Plaintiffs' lost wages and tips damages were not great.

After Braden filed a DFEH complaint in September of 1987 and obtained a right-to-sue letter, this case was filed in Lake County Superior Court in November of 1987.

There is no diversity jurisdiction in this case, all parties being citizens of California.

After removal to federal court, plaintiffs filed a First Amended Complaint, seeking to delete all causes of action which conferred federal jurisdiction under section 301(a) of the Labor Management Relations Act. They so informed the District Court on their motion for remand, which was opposed by these Petitioners. The Court denied remand. Plaintiffs then filed a Second Amended Complaint, adding a 301(a) cause of action against their union, Local 18, for breach of duty of fair representation. They also inserted in their basic Cal. Gov't Code 12940 discrimination cause of action an allegation that defendants had violated the collective bargaining agreement. Nothing ever came of the allegations pertaining to the collective bargaining agreement. The collective bargaining agreement contained a grievance procedure which plaintiffs never pursued.

On June 8, 1988 this Court decided *Lingle v. Norge* 486 U.S. 399, 108 S.Ct. 1877 (1988), holding that the assertion of non-waivable statutory rights is not the basis of 301(a) jurisdiction, even though the same facts which show infringement of those rights might also show breach of a collective bargaining agreement. Shortly thereafter, in October of 1988, plaintiffs announced that they had settled with Local 18. This left in the case only California Government Code claims. Trial was still a year and a half away.

In March of 1989 plaintiffs moved for certification of a class. The Court certified a class of all present and former female employees of Konocti. Notice was sent to the class members and a class of about 350 women was closed. On the trial the jury found in favor of defendants on the issue of class-wide discrimination, the evidence clearly demonstrating substantial representation of women in all seventeen departments of Konocti, the 1986 dining room waiter crew being the lone exception.

In November of 1989 plaintiffs moved for summary judgment on the issues of 1986 discrimination and 1987 retaliation for the DFEH filings. Judge Legge denied the motion on the first ground, later changing his mind and directing a verdict on that issue for plaintiffs at trial. On the second matter, 1987 non-rehiring of the plaintiffs who in June of 1986 had filed DFEH complaints, these petitioners filed no opposition and the motion was granted. It was also granted, however, over Petitioners' opposition, as to Braden, who had neither filed a DFEH complaint in 1986 nor applied for work at Konocti in 1987.

Jury trial started in June of 1990. There was received in evidence without objection and without qualification plaintiffs' Exhibit 15. This was Konocti's 13 page agency response to the three plaintiffs' 1986 DFEH complaints. It set forth the reasons why in managment's opinion the 1986 dining room waiters were better qualified than each of the plaintiffs to serve the 1986 menu. At trial Ted Hudson, a 1985 dining room waiter who was retained in the dining room in 1986, testified that he had operated his own Italian restaurant for several years, that tableside preparation of the items on the 1986 menu required years of experience, that serving the 1986 menu required skills and knowledge not required

for serving the 1985 menu, and that one of plaintiffs, Wanda Brooks, needed training in the use of a tableside cooking device known as a gueridon. Another 1986 dining room waiter, Di Pietro, testified that he attended a hotel and restaurant school in Italy for three years, and worked in restaurants there for ten years, before coming to the United States. Judge Legge curtailed evidence from Di Pietro concerning specific examples of tableside preparation of sauces and other tableside blending of ingredients, having already announced without a motion from plaintiffs that he intended to direct a verdict for plaintiffs on the issue of discrimination. Di Pietro testified that he worked with plaintiffs in the dining room when the place was crowded, that then there was no tableside preparation, that in his opinion plantiffs were not qualified to serve the 1986 menu and that there was not enough time to train them for the 1986 season. A waitress at Konocti, Marjorie Wright, testified that in her opinion it would take a month and one half to two months to learn how to serve the 1986 menu.

The trial judge instructed the jury to find against Konocti and Aristocrat and in favor of all four plaintiffs on the only two liability issues in the case: 1986 discrimination and post-1986 discriminatory non-rehiring and retaliation. While these defendants conceded liability for 1987 post-DFEH complaint non-rehiring of three plaintiffs, and that condition prevailed only from April of 1987 until the three plaintiffs were offered their jobs back in August of 1987, all other matters as to which Judge Legge directed a verdict were contested and presented issues for the jury.

Chief among these was the Court's instruction that defendants illegally retaliated against Carole Braden in 1987, when Braden did not even reapply for employment in that year.

The jury was asked to find whether Mazzola had participated in the violations which the Court directed the jury to find, and the jury found that he did.

Ted Hudson was the top wage and tip earner in the Konocti dining room in 1986 and 1987, reporting a total of only $16,700 for both years. Juanita Raymos reported wages and tips of $13,050 in those two years. Yet the jury awarded Raymos $13,200

for lost wages and tips in those two years. It did this by adding to the difference between Hudon's and Raymos' 1986-1987 earnings an amount equal to 15% of the dining room gross receipts for those years (the 15% equaled $60,300) and giving Raymos 16% of that $60,300, i.e. $9,650. This latter calculation has no bearing on Raymos' losses of wages and tips. As appears, in Raymos' case it resulted in an illegal enhancement of $9,650. Chrapowicz made $14,200 in wages and tips in 1986 and 1987, against Hudson's $16,700 but the jury enhanced her damages of $2,500 by awarding her 32% of the $60,300, an additional $19,300. The enhancement which the jury awarded to Brooks for 1986-87 was the same $9,650 which it awarded to Raymos, but in Braden's case the enhancement was $21,700 for those two years, i.e. the jury awarded Braden 36% of the $60,300 amount.

Braden and Brooks worked at Konocti in 1988 and 1989 but contended they were discriminated against in those years, in the matter of work assignment, due to their prior DFEH complaints. The trial judge over the competent countervailing evidence of Marjorie Wright, who was Brooks' and Braden's supervisor, instructed the jury so to find. The best dining room wage and tip earner in 1988 was Robert Susumilch and in 1989 Bonnie Crummer. Their combined wages and tips for those two seasons were about $22,000. Brooks' reported 1988 and 1989 earnings were $11,150. Instead of allowing as lost wages and tips for those two years only the difference of $10,850, the jury enhanced the $10,850 by $9,690, being total dining room gross times 15% (which in 1988-89 was $53,840) times 18%, which the jury believed Brooks would have received. Finally, in 1988 and 1989 Braden reported $17,540 in wages and tips compared to the top earnings of $22,000. Her true damages for loss of wages and tips were $4,460. To this the jury added $11,843, being 22% of the 1988-89 amount of $53,840.

The enhanced wage loss figures were brought to the attention of the trial judge on motion for new trial, but he declined to grant any remittitur or other relief. The Court entered judgment for plaintiffs in the total amount of $311,949. The judgment included $35,000 to each plaintiff for emotional distress and a $50,000 punitive damage award against Konocti.

Plaintiffs then moved for attorney fees, seeking the sum of $841,305.15. The $841,305.15 included a lodestar of $394,441, enhancement of 1.1 (i.e. an additional $433,885.10) and fee motion hours of $12,979.05. Submitted with the application were two recently prepared summaries showing the hours of plaintiffs' two lawyers from the beginning of the case. No data supporting the summaries was submitted, although both lawyers submitted declarations indicating they maintained contemporaneous time records. The summaries manifestly were made from some record. The fee agreement between plaintiffs and their counsel was not produced on the motion for fees. All we know about the fee agreement is what can be gleaned from plaintiffs' memorandum on the fee motion ("Ms. Sher, joined by Ms. Dietrich . . . agreed to represent them on a contingent basis in a lawsuit challenging defendants practices. Other than a nominal initial sum, ($450 each), the plaintiffs were unable to afford to pay any legal fees to Ms. Dietrich or Ms. Sher or even to reimburse them for costs." Memorandum in Support of Motion for Fees, Nov. 12, 1991, p. 4.

Soon after receiving the fee motion defense counsel contacted Mr. Pearl, who is special counsel who joined the case for the fee applications. Defendants suggested to Pearl the dates of December 6 and 7, 1991 for the deposition of Sher and Dietrich, plaintiffs' attorneys. Pearl said he would get back but had not done so by the time it was necessary for defendants to respond in writing to the fee motion. Defendants' response included a request that the Court stay its hand on the fee application pending reasonable discovery. Specifically defendants sought discovery of the fee agreement between plaintiffs and their counsel and plaintiffs' counsel's original time records. Several attempts to reach Pearl by phone were unsuccessful. In a declaration filed December 7, 1990, Pearl stated plaintiffs counsel declined to be deposed. Defendants therefore served a subpoena duces tecum requesting the fee agreement and the records underlying the hours summaries. Pearl wrote back on December 10, 1991 that plaintiffs' attorneys would ignore the subpoenas.

The fee hearing was held on December 14, 1991. It lasted about twenty minutes. Defendants asked the Court to stay his

hand pending the specifically defined discovery defendants had requested.

The trial court denied the request for original time records and the fee agreement. He proceeded solely on the basis of the hours summaries to find 2,000 compensable hours. The hourly rate was fixed at $170. Expressly relying on the now disapproved case of *Fadhl v. City and County of San Francisco* 859 F.2d 649, the Court enhanced the lodestar by a multiplier of 1.75. This created additional fees of $255,000. The Court added compensation for the fee application effort in the amount of $16,200 and $8,500 in costs, for total fees and costs of $619,700. The trial court denied a subsequent motion to alter or amend the fee award.

On appeal the Ninth Circuit affirmed in all respects. Both in the trial court and in the Ninth Circuit defendants strenuously objected to any enhancement of the lodestar, relying on Justice White's opinion in *Pennsylvania v. Delaware Valley Citizens Council* 483 U.S. 711 (1987). The Ninth Circuit's unpublished opinion did not deal with the enhancement issue. That opinion was rendered on the same day this Court decided the *Dague* case. Petitioners filed a rehearing petition based on *Dague* in the Ninth Circuit, but that petiton was summarily denied.

REASONS FOR GRANTING THE WRIT

I. Pendent Jurisdiction

If this case was free of reversible error Petitioners would not at this post-judgment stage ask the Court to dismiss or remand on the ground that the District Court abused its discretion in choosing to exercise pendent jurisdiction of the state law claims when all federal claims had been voluntarily dismissed and the case was still in its early stage. But the direction of a verdict on the discrimination issue in this case was reversible error, as Petitioners are attempting to show herein. That being so, there is no unfairness to plaintiffs, no estoppel of defendants, to assert that the judgment should be vacated also on the jurisdictional ground and the case remanded to state court.

This Court's opinion in *Carnegie-Mellon Univ. vs. Cohill* 484 U.S. 343 (1988) opens the door to remandment of this case to state court. This Court should adhere to a policy of letting the state courts decide state law causes of action, unless there is a very good reason why a federal court should decide state law issues among citizens of the same state. In the case at bar there is no such good reason, or in fact any reason at all, why Judge Legge should have continued to exercise pendent jurisdiction of the Cal. Gov't. Code 12940 claims after the last federal claim was voluntarily dismissed in October of 1988, but there are many good reasons why at that point he should sua sponte have remanded the action. Among these reasons are comity, the crowded federal docket, and the avoidance of *Erie* problems. The new Supplemental Jurisdiction statute (Judicial Improvements Act of 1990 (Pub. L. 101-650) 28 U.S.C. 1367, does not apply in cases filed before December 1, 1990. However, all of the reasons for declining jurisdiction listed in subsection (c) of that statute are present in the case at bar.

II. Interlocutory Summary Judgment

This Court's opinion in *Celotex Corp. vs. Catrett* 477 U.S. 317 (1986) emphasizes the importance of summary judgment in relieving the District Courts of unnecessary trial time. At oral argument of this case in the Ninth Circuit, the Court seemed to adopt a position that once summary judgment has been rendered there is no mandatory duty for the trial judge to change it, even if the summary judgment order is non-dispositive, even if evidence at trial shows the summary judgment order was wrong. Petitioners urge this Court to repudiate that view. Trial by affidavit at early stages of a case before the evidence is fully developed can lead to the wrong result. In the case at bar Judge Legge held on summary judgment, and on that basis instructed the jury, that petitioners had unlawfully retaliated against Carole Braden in 1987. 1987 was the year the other three plaintiffs were turned down in their request for employment at Konocti. But Carole Braden quit Konocti in May of 1986, when the new dining room policy was announced, and she worked elsewhere through 1986 and 1987, not applying to Konocti in 1987. Except one banquet job near the end of 1987, there were no relations between Braden and Konocti

in 1987. These matters were brought to Judge Legge's attention at the November 17, 1989 hearing on summary judgment and in written submissions on the settlement of the summary judgment order. Nevertheless, the jury was instructed, on the basis of the summary judgment order, that Konocti and Aristocrat had unlawfully retaliated against Braden in 1987. This Court should reaffirm the principle of Rule 54(b) of the Federal Rules of Civil Procedure, that a non-dispositive summary judgment order is subject to revision at any time before final judgment, and that such orders should be revised when the evidence indicates they are wrong.

III. Proof of Discrimination

The directed verdict on discrimination in this case was in error. The jury reasonably could have found that the four waitress plaintiffs were excluded from the Konocti dining room in 1986 not because they are women, but because management believed they were less qualified to serve the 1986 menu than the seven waiters, all but two of them Italian-speaking, and *all* of them with extensive prior experience in tableside preparation of Italian dishes, who did work in the dining room in 1986. This Court should reaffirm the principles and procedure of *Mc Donnell Douglas Corporation vs. Green* 411 U.S. 792 (1973) and *Texas vs. Burdine* 450 U.S. 257 (1981). It is true that these plaintiffs offered evidence in the case at bar to the effect that they were qualified to do the tableside preparation required by the 1986 menu. But their evidence did not rise to the level of a directed verdict. There was ample countervailing evidence (e.g. plaintiff's Exhibit 15) indicating that Konocti management in good faith believed that plaintiffs were not qualified to serve the 1986 menu, that there was not enough time before the 1986 season to train them in those qualifications, and that the waiters actually hired were better qualified to serve the 1986 menu than plaintiffs were. The directed verdict on discrimination in this case was error. Viewing the evidence in the light most favorable to Petitioners, *Continental Ore vs. Union Carbide* 370 U.S. 690, fn. 6 (1962), it is clear that the directed verdict on discrimination must be reversed. This Court should grant the writ in order to reaffirm the salutory principle that discrimination is an issue of fact to be resolved by the factfinder on all the relevant evidence. The

California Courts do not hold otherwise, *Stephens vs. Coldwell Banker* 199 Cal.App.3d 1394, 1401. In federal Court the *Mc Donnell Douglas* rules for proof of discrimination must govern the proceedings.

IV. New Trial

This Court should reaffirm the centuries-old rule that a trial judge must set aside excessive damages or damages not supported by the evidence. In our case it was proper for the jury to fix damages of lost wages by taking for 1986 and 1987 what the highest earning waitperson earned and deducting therefrom the actual earnings of the plaintiffs. But such earnings, both for plaintiffs and the highest-earners, already included both wages and tips. When the jury went further, under the rubric of lost earnings, and applied 15% to the restaurant grosses and distributed that 15% among plaintiffs, the jury was outside the evidence and was also compensating plaintiffs twice for the same loss. Plaintiffs, not these Petitioners, put before the trial judge the evidence of precisely how the jury calculated damages. On motion for new trial, the trial court could and should have reduced the verdict by eliminating the illegal enhancements, offering plaintiffs the option of a reduced judgment or a complete new trial on damages.

V. Attorney Fees

A. Discovery of the Fee Agreement Between Plaintiffs and Their Counsel

In *City of Riverside vs. Rivera*, 477 U.S. 561, this Court held that a reasonable attorney fee need not be proportionate to the amount of damages recovered. In *Blanchard v. Bergeron* 489 U.S. 87 (1989) this Court held that a contingent fee agreement does not impose a limit on fees available under 42 USC 1988. *Blanchard* did say that the fee agreement is one of the factors which the Court might consider in arriving at a proper fee. In *Vanegas vs. Mitchell*, 495 U.S. 82, 110 S.Ct. 1679 (1990) this Court held that the fact of lower court-awarded fees does not prevent an attorney from recovering against his client a higher contingent fee provided for in their agreement.

It seems quite clear that in fixing a statutory fee we start with the lodestar, being productive hours times reasonable rate. The question which the present care presents is whether there are any circumstances under which the terms of the fee agreement would cause the trial court to reduce the lodestar amount. Petitioners believe there are such circumstances. Respondents below took the position, citing *Vanegas vs. Mitchell*, 495 U.S. 82 (1990), that no matter what the fee agreement says, it will not affect the amount of the award. The lower courts agreed: "What we are concerned with here is an adequate award of attorneys fees to the defendants, not a question of how the money might be shared between plaintiffs and their counsel." (Dkt. No. 370, E.R. 14:22-25). (Remarks of the trial judge.)

There are injunctive relief cases and there are damages cases. The case at bar is purely a damage case, all claims for injunctive or monetary relief having long since been abandoned. There are class actions, which usually involve no fee agreements, and there are individual plaintiff cases, where written fee agreements are common, if not required by law. The case at bar had both of these aspects, but we are dealing here with the private plaintiff aspect.

Cal. Gov't. Code § 12965(b) provides for an award to the party, not to his attorney. When the attorney and party contract, the attorney presumably has advised the client of the possibility of court-awarded fees against the defendant. The Courts should enforce the fee agreement between the attorney and client, and should not make a new contract for the plaintiff and his attorney. *Vanegas vs. Mitchell, supra.* In fixing fees under a fee shifting statute a court is trying to decide how much money a losing defendant should pay to a victorious plaintiff, not to the plaintiff's lawyer. In so doing the court should be guided by the objective of making sure that poor clients with good cases get good representation and the objective of providing compensation to the attorney for his successful work. To do this the Court must look at the fee agreement to see how much of the potential recovery of damages and fees the client has agreed to pay the lawyer, and what provisions have been made for costs. If the lawyer is to share in the damage recovery and also take all of the court-awarded fee, the lodestar should be reduced. If the parties have agreed that the

client will keep all damages and the attorney will receive the court-awarded fee, a fee equal to the lodestar should be awarded. If the agreement makes no distinction between damages and a fee award, and provides merely for a percentage fee, the Court should award a statutory fee only if the lawyer's contingency fee is less than the lodestar. In other words, the trial court should fix the lodestar and award the same, unless the fee agreement indicates the lawyer will wind up with more than the lodestar, in which case the lodestar should be reduced so that the lawyer's share of the damage recovery and the reduced lodestar equal the original lodestar. This would reduce the amount of fees payable by defendants, who after all are already paying the damage judgment.

In the case at bar plaintiffs recovered damages of $311,949. How much of this have they agreed to pay their attorneys? That we do not know, because the court at plaintiffs' instance denied discovery of the fee agreement. If these four plaintiffs have agreed to pay a third, quarter, or 40% of their damages to their lawyers, plaintiffs should be held to that agreement and the lodestar payable by these Petitioners should be reduced by the amount of the contingent fee. In this way the fee agreement may indicate that reduction of the lodestar is proper. It is idle to speculate on what might be the terms of the fee agreement between Braden et al. and their attorneys in this case. We do not know what those terms are, but those terms may affect the amount of the fees payable by Petitioners. See *Sullivan vs. Crown Paper Board Co.* 719 F.2d 667, 668-669 (3rd Cir. 1983), where the Court remanded for ascertainment of the contingent fee agreement's terms.

The fee-shifting statutes do not say that plaintiffs should be relieved of their contractual obligations to their lawyers. It is not the purpose of the typical fee-shifting statute providing for "a reasonable fee" to relieve the plaintiff of any charges for fees and cause legal services to be free of charge if plaintiff wins. The purpose of such statutes is to get plaintiff a lawyer and adequately compensate the lawyer for his successful work. These objectives are well served by fixing fees in the light of the fee agreement.

In *National Ass'n. of Concerned Veterans vs. Sec. of Defense* 675 F.2d 1319 (D.C. Cir. 1982) at p. 1328, the Court stated: "The initial inquiry therefore in determining whether a premium for risk should be awarded must focus on the terms of any agreement between the applicant and his counsel relating to fees. The better practice would be for the applicant to include a copy of any such agreement in the fee application. In any event, the applicant should state whether any fee agreement exists and recite its precise terms."

In *Pennsylvania vs. Delaware Valley Citizens Council* 483 U.S. 711, (1987), this Court stated that the fee agreement may have a bearing on the question of enhancement of the lodestar, since the lawyer may have offset the risk of loss by negotiating a contingency which, if it materializes, would produce compensation greater than the prospective lodestar amount. For these reasons this Court should vacate the fee award and direct plaintiffs to produce their fee agreement in this case.

V. Attorney Fees

B. Discovery of Plaintiffs' Counsel's Original Time Records

Plaintiffs' victory in this case was not complete. Plaintiffs lost the verdict and judgment on their class action allegations and on their age discrimination claims. Under *Hensley vs. Eckerhart* 461 U.S. 424 (1981) plaintiffs are not entitled to compensation for the hours devoted to these two matters. A great deal of plaintiff counsel's time was devoted to the class action aspects of this case.

Petitioners cannot say what plaintiffs counsel's original time records would show because petitioners have never seen those records. In declarations in the District Court both of plaintiffs' attorneys stated they maintained contemporaneous time records.

The document which the District Court relied on completely in fixing hours was not an original record. It was a recently prepared summary, apparently from original records. The general rule of evidence in that summaries are not admissible unless the underlying documents they summarize are available to the party against whom the summaries are offered. Federal Rules of Evidence, Rule 1006, 4 Wigmore on Evidence, ¶ 1230.

Attorneys who anticipate making fee applications should keep accurate and current records of work done and time spent. *National Ass'n. of Concerned Veterans vs. Sec. of Defense,* supra, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

Such records should be produced to the Court and opposing counsel as a matter of course on fee applications.

The entries on the summaries produced in this case are elliptical and sometimes unintelligible. For this reason Petitioners asked to depose plaintiffs' attorneys, not for the purpose of embarrassing them, but for the purpose of arriving at a just conclusion as to the number of hours properly chargeable to Petitioners in this case. The District Court accepted plaintiffs' summaries almost entirely, reducing them by only 12% in arriving at a figure of 2,000 hours. Petitioners think that a careful review of the original records and specific deposition examination of plaintiffs' counsel will show that the number of compensable hours in this case is closer to 1,000 than to 2,000. Again, in *Nat. Ass'n. of Concerned Vets vs. Sec. of Defense* 675 F.2d 1319, 1334 (D.C. Cir. 1982) the Court held that specific discovery should have been permitted to test the accuracy of plaintiffs' fee application.

The District Courts have the power to circumscribe the subject matter and length of depositions. Taking depositions does not entail an evidentiary hearing. The results of the depositions may be put before the Court in written form in the fee motion procedure.

VI. This Court should grant the Writ and Decide Whether the Rule of *City of Burlington v. Dague* ____ U.S. ____, 112 S.Ct. 2638 (June 24, 1992) Applies to Fee Awards in Federal Court Where the Right to Fees is Granted by a State Statute

In *Ackerman vs. Western Electric Co., Inc.* 643 F.Supp. 836, 857-868 (N.D. Cal. 1986), Judge Schwarzer considered whether state or federal law should control the calculation of the amount of fees in federal court under Cal. Gov't Code 12965(b). He there pointed out conflicts among the circuits on this issue, and the fact

that there is no definitive law on the subject. In *Ackerman*, Judge Schwarzer, relying on *Blum vs. Stensen* 465 U.S. 886, 895 (1984), declined to enhance the lodestar. He noted that the California Agency charged with administering the Fair Employment and Housing Act had not followed *Blum vs. Stensen*, supra, in the matter of enhancement *DFEH vs. Cairo* (1984) FEHC Sec. No. 84-04 at p. 25 note 8. To the similar effect are *Serrano vs. Unruh* 32 Cal.3d 621, 639 fn. 29 (1982) and *Sundance vs. Municipal Court* 192 Cal.App.2d 269, 274 (1987).

This Court should grant certiorari and extend the salutary rule of *Dague* to all fee application in federal court, including fee applications based on state statutes. The federal courts must have the last word on compensation of attorneys for the performance of services in federal court. Also, the *Dague* arguments against enhancement, such as double counting, encouragement of fee litigation, rewarding the weakest cases and punishing the best defenses, immoderate fees, do not necessarily refer to the intent of Congress, and these objections have equal force whether enhancement is sought under a federal statute or a state statute.

It is clear that Judge Legge did not have the benefit of *Dague* when he added $255,000 to the fee award in this case. He did expressly rely on the Ninth Circuit's opinion in *Fadhl vs. City and County of San Francisco* 859 F.2d 614 (9th Cir. 1988), which *Dague* effectively overruled. Even if *Dague* is not controlling here, the trial court should be given the opportunity to reconsider the enhancement issue in the light of *Dague*.

VII. Conclusion

On the merits of this case there are four judgments, one for each plaintiff. A subsequent single judgment for attorney fees was entered in favor of the four plaintiffs. Petitioners ask the Court to grant the writ of certiorari, determine that the directed verdict for plaintiffs on discrimination and the summary judgment order in favor of Braden were error, vacate all judgments favorable to plaintiffs, and remand the case to the District Court, with instructions to remand the case to state court, or, alternatively, instructions to grant Petitioners a new trial. The fee judgment should be vacated and the case remanded to the District Court with instructions to permit discovery of the fee agreement and original time records and to permit reasonable deposition cross-examination of those writings. This Court should hold that *Dague* precludes enhancement of attorney fee awards in federal court.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16634
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn
Defendant-Appellant

No. 90-16635
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn
Defendant

and

ARISTOCRAT HOTELS, INC.
Defendant-Appellant

No. 90-16637
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn
Defendant

and

JOSEPH MAZZOLA
Defendant-Appellant

No. 91-15457
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn;
JOSEPH MAZZOLA;
ARISTOCRAT HOTELS, INC.
Defendants-Appellants

No. 91-16152
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellants,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba Konocti Harbor Inn;
JOSEPH P. MAZZOLA;
ARISTOCRAT HOTELS, INC.
Defendants-Appellees

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted January 17, 1992
San Francisco, California

BEFORE: CHAMBERS, TANG and PREGERSON Circuit Judges.

This is a sex discrimination and retaliation case filed under Cal. Govt. Code ¶ 12940 based on Konocti Harbor Inn's policy of hiring only male waiters for the 1986 summer season. The Konocti Harbor Inn ("KHI") is a resort complex in rural Lake County, in Northern California. It is owned and operated by the Convalescent Trust Fund ("Trust Fund") of U.A. Local 38 of the Plumbing and Pipefitting Industry. Joseph P. Mazzola was the leader of Local 38.[1] Aristocrat Hotels, Inc. ("Aristocrat") man-

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1]Mazzola died on August 12, 1989. In January 1990, the plaintiffs substituted the Estate of Mazzola as a party-defendant.

aged KHI from March 1987 through the 1988 season. Plaintiffs are four women, Carole Braden, Juanita Raymos, Christine Chrapowicz and Wanda Brooks, who had worked at KHI prior to 1986.

In November 1989, the district court granted summary judgment in favor of the plaintiffs and against the Trust Fund and Aristocrat on the issue of retaliation. The jury trial commenced in June 1990. Prior to submitting the case to the jury, the district court granted the plaintiffs' motion for a directed verdict on the issue of the Trust Fund's and Aristocrat's liability for unlawful sex discrimination. The jury subsequently returned a verdict in favor of the plaintiffs and against Mazzola, finding that Mazzola had discriminated against the plaintiffs on the basis of their sex. The district court denied the defendants' motions for Judgment Notwithstanding the Verdict and New Trial. The district court then awarded attorneys' fees to the plaintiffs.

We affirm the district court in all aspects.

Jurisdiction. Defendants assert that the district court should have remanded this case to the state court once the plaintiffs voluntarily dismissed their federal claims. The judgment of the district court "ought not be lightly disturbed." *Schneider v. TRW, Inc.,* 938 F.2d 986, 994 (9th Cir. 1991). *See also Schultz v. Sundberg,* 759 F.2d 714, 718 (9th Cir. 1985). Given the time and judicial resources already invested in the case, the district court did not abuse its discretion by retaining jurisdiction over the case.

Sufficiency of Notice of Death upon the Record: Defendants put the notice of death of Mazzola on the very last page of the Defendants' Supplemental Responses to Plaintiffs' Fourth Set of Requests to Admit, Interrogatories and Request for Production of Documents. Defendants contend this constitutes sufficient suggestion of death under Fed. R. Civ. P. 25(a) and therefore, Plaintiffs failed to file before the statute of limitations expired.

The Ninth Circuit has not addressed this issue of sufficiency of notice. However, the Tenth Circuit has found that the "running of the ninety-day limitations period under Rule 25(a)(1) is not triggered unless a formal suggestion of death is made on the record, regardless of whether the parties have knowledge of a

party's death." *Grandbouche v. Lovell,* 913 F.2d 835, 836 (10th Cir. 1990) (per curiam). We adopt that rule and find that no formal suggestion of death was made on the record and therefore the statue of limitations had not run.

Admission of California Department of Employment and Fair Housing ("CDEFH") Right-to-Sue Letter: Defendants argue that plaintiff Braden's CDEFH complaint was not filed within the one year limitation. However, at trial the district court admitted into evidence the CDEFH right to sue letter which indicated on its face that her complaint was timely filed. At trial Braden testified that she filed with the CDEFH in 1986 and that the wrong violation date on her 1987 CDEFH complaint was an innocent mistake. The district court was in the best position to judge credibility. We affirm the district court.

Summary Judgment on Retaliation: "Ordinarily, summary judgment should not be granted when there are relevant facts remaining to be discovered, but the party seeking discovery bears the burden of shoiwing what specific facts it hopes to discover that will raise an issue of material fact." *Harris v. Duty Free Shoppers Ltd. Partnership,* 940 F.2d 1272, 1276 (9th Cir. 1991) (citing *Continental Maritime v. Pacific Coast Metal Trades Dist. Council,* 817 F.2d 1391, 1395 (9th Cir. 1987)). The summary judgment motion on the issue of retaliation was granted against the Trust Fund and Aristocrat in November 1989, seven months before trial. Defendants argue there was sufficient evidence to defeat a summary judgment motion.

At the time of the summary judgment motion, the court had declarations about the rejected job applications; declarations that others had been hired in place of the plaintiffs; an affidavit reporting a direct assault on plaintiff Brooks; and affidavits describing the lack of adequate work hours given to those rehired in 1988 and 1989. The defendants offered no opposing affidavits nor any excuse for failure to do so. Even the district court commented that the summary judgment was granted "because the defendants had not adequately responded to discovery and did not make a legally adequate defense to the partial summary judgment motion at the time it was filed." We affirm the district court's grant of summary judgment.

Directed Verdict on Sex Discrimination: The Ninth Circuit reviews a directed verdict under the same standard applied by the district court; such a verdict is proper if, considered in the light most favorable to the non-moving party, the evidence permits only one reasonable conclusion. *Peterson v. Kennedy,* 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied,* 475 U.S. 1122 (1986). Further, to benefit from favorable inferences, the party opposing the directed verdict "must present 'substantial evidence' in support of its claims." *Feldman v. Simkins Industries, Inc.,* 679 F.2d 1299, 1303 (9th Cir. 1982). The district court directed a verdict against defendants on the issue of sex discrimination because a prima facie case had been established and the defendants failed adequately to answer or rebut the plaintiffs' evidence. We affirm the district court.

Jury Verdict on Damage Awards: The standard for reviewing jury verdicts is whether they are supported by "substantial evidence," that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Oltz v. St. Peter's Community Hospital,* 861 F.2d 1440, 1450 (9th Cir. 1988).

Because of the variety of evidence, including tax records, tip records, and gross income of the dining room, the district court, who had viewed the trial in its entirety, found the jury damage awards reasonable. We cannot disagree.

Denial of JNOV: We review de novo the district court's denial of a motion for JNOV. *Wilcox v. First Interstate Bank, N.A.,* 815 F.2d 522, 524-25 (9th Cir. 1987). JNOV is appropriate only when the evidence, viewed in the light most favorable to the non-moving party, could not reasonably support the verdict. *Locricchio v. Legal Services Corp.,* 833 F.2d 1352, 1356 (9th Cir. 1987). Defendants did not place sufficient evidence in the record to uphold their contentions about Aristocrat. On the other hand, there was sufficient evidence on the record to permit a reasonable jury to find that Aristocrat was in charge of the daily management of KHI. We affirm the district court's denial of the JNOV.

Attorneys' Fees: Attorney fee awards are at the discretion of the trial court and are reviewed for abuse of discretion. Cal. Govt. Code § 12965(b).

In order to avoid turning the attorney fee proceedings into a second trial, the district court was well within its discretion to deny defendants discovery of plaintiffs' attorneys' time records. Further, the district court was in the best position to judge the reasonableness of the awards. Based on its knowledge of the case, the district court reduced the amount of hours claimed by plaintiffs and reduced the lodestar amount.

Defendants claim that the district court abused its discretion because it did not consider the contingency fee arrangement the plaintiffs' attorneys had with the plaintiffs. However, review of contingency fee arrangements is not mandatory. *See Blanchard v. Bergeron*, 489 U.S. 87, 93-96 (1989).

Further defendants claim that the hourly rate awarded was inappropriate for the amount of experience the plaintiffs' attorneys had. However, the district court was presented with affidavits verifying that the proposed hourly rate was consistent with some other practitioners. We affirm the award of attorneys' fees.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16634
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN,
Defendant-Appellant.

No. 90-16635
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN,
Defendant.

and

ARISTOCRAT HOTELS, INC.
Defendant-Appellant.

No. 90-16637
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN,
Defendant.

and

JOSEPH MAZZOLA
Defendant-Appellant.

No. 91-15457
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellees,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN;
JOSEPH MAZZOLA;
ARISTOCRAT HOTELS, INC.,
Defendants-Appellants.

No. 91-16152
D.C. No. CV-87-06028-CAL

CAROLE BRADEN; JUANITA RAYMOS;
CHRISTINE CHRAPOWICS; WANDA BROOKS
Plaintiffs-Appellants,

v.

PLUMBING & PIPEFITTING INDUSTRY
LOCAL 38 CONVALESCENT TRUST FUND,
dba KONOCTI HARBOR INN;
JOSEPH P. MAZZOLA;
ARISTOCRAT HOTELS, INC.,
Defendants-Appellees.

BEFORE: CHAMBERS, TANG and PREGERSON Circuit Judges.

A majority of the panel has voted to deny the Appellants' Petition for Rehearing. Accordingly, the Petition for Rehearing is denied.